

Political Law Compliance Considerations for Energy Companies and Utilities

Society of Corporate Compliance and Ethics
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Session Overview



- Overview of campaign finance, conflict of interest laws, pay-to-play, gift and lobbying laws
- Focus on issues raised with relation to energy companies and utilities
- Compliance strategies

Political Law Compliance



- Any time you communicate or interact with a public official, or spend money and a public official participates in the event or occasion, it is likely you are engaging in regulated activity.
 - If related to election or campaign, campaign finance and pay-to-play considerations.
 - If providing a personal benefit, gift considerations.
 - If in connection with influencing an official decision, lobbying considerations.
- Bipolar regulatory environment
 - Supreme Court rulings contrasted with tightening pay-to-play rules

Campaign Contributions Generally

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- When giving to federal, state or local candidates, party committees or PACs, applicable federal, state, and/or local laws may come into play
- These laws may prohibit or limit contributions or impose reporting requirements

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Federal Hard Money Rules

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Contribution Limits for Individuals and Non-Multicandidate PACs

2017 – 2018 Limits

- To Candidates – \$2,700* per election
- To State Party Committees – \$10,000 per yr.
- To PACs – \$5,000 per yr.
- To National Party Committees – \$33,900* per yr. plus:
 - An additional \$101,700* per yr. for buildings
 - An additional \$101,700* per yr. for recounts and legal fees
 - An additional \$101,700* per yr. for conventions (only for national party committees, not senatorial or congressional national party committees)
- Aggregate contribution limit for all of the national party committees of a given party (Democratic or Republican): \$813,600* per year

*These limits are indexed for inflation

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Contribution Limits for Multicandidate PACs

- To Candidates – \$5,000 per election
- To State Party Committees – \$5,000 per yr.
- To PACs – \$5,000 per yr.
- To National Party Committees – \$15,000 per yr. plus:
 - An additional \$45,000 per yr. for buildings
 - An additional \$45,000 per yr. for recounts and legal fees
 - An additional \$45,000 per yr. for conventions (only for national party committees, not senatorial or congressional national party committees)
- Aggregate contribution limit for all of the national party committees of a given party (Democratic or Republican): \$360,000 per year

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Establishing and Operating a Standard Corporate or Trade Association PAC

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- PAC name/PACronym
- Federal law permits a corporation (but typically not a partnership or an LLC not filing as a corporation with the IRS) to establish and operate, and pay administrative expenses for, a PAC to make contributions to federal candidates.
- By-laws and organizational documents
- Issues related to incorporation
- Is it necessary to get a W-9 for contributions?
- Taxpayer ID number
- Investing PAC funds
- Federal and state income taxes

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Corporate Contributions

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- 28 states plus D.C. permit corporate contributions:

Alabama	Nebraska
California	Nevada
Delaware	New Hampshire
Florida	New Jersey
Georgia	New Mexico
Hawaii	New York
Idaho	Oregon
Illinois	South Carolina
Indiana	South Dakota (eff. July 1, 2017)
Kansas	Tennessee
Louisiana	Utah
Maine	Vermont
Maryland	Virginia
Mississippi	Washington

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Corporate Contributions

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- Five states currently permit unlimited corporate contributions (i.e., Alabama, Nebraska, Oregon, Utah and Virginia).
 - Illinois limits for a particular elected office are lifted if IE or self-funding threshold is reached for that particular office.
- The remaining 23 states plus D.C. allow corporate contributions but impose limits.
- Partnerships: each state has different rules on pass-through

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Operating a Multi-State PAC

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- Some states impose burdensome restrictions on PACs.
 - Michigan used to require annual authorization on payroll deductions – repealed January 2016
 - New York treats administrative expenses as contributions that count against the contribution limit, and requires in-state bank account. Transfers exceeding \$1,000 from out-of-state accounts are not permitted.
 - North Carolina requires in-state assistant treasurer.
 - Vermont requires compliance with state limit on what a PAC can receive to \$4,080 per two-year cycle.
- Most states require registration and reporting by the PAC.
 - Some require greater itemization in reports than required under federal law.
- Beware of state and local pay-to-play laws, which may apply to PAC donations.
- Some PAC aggregate limits struck down in wake of *McCutcheon*

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Special Restrictions on Certain Industries

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- New Jersey – Prohibits insurance companies, banks, utilities and their affiliates, doing business in the state from making contributions "for any political purpose whatsoever."
- Check state law for determining whether a utility contribution ban extends to energy companies
 - Also some states have prohibitions on a utility seeking cost-recovery for lobbying activities

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Interface with Other Rules

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- Special restrictions on lobbyists and their employer.
 - Special restriction on political contributions by lobbyist and their employer (e.g., Alaska, Kentucky, Maine, and South Carolina).
 - Special restriction on other political activity – Ability to help with campaign or be a fundraiser (e.g., Alaska, Maryland, New Mexico, and South Carolina).
- Need to coordinate with lobby compliance program.
- Beware of sessional bans.

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How to Avoid Pay-to-Play Violations

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- Avoid linkage: when making contributions or donations (political or charitable) or providing gifts
- Make sure that your consultants are properly vetted
- Comply with specific conflict of interest laws (e.g., dual hatted employees, post-employment rules)
- Conflict of interests in government procurement process
- Be aware of strict liability pay-to-play laws (federal, state, and local)

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Avoid Linkage

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- It is generally a good idea not to:
 - put justifications or reasons for contributions in writing.
 - send transmittal letters.
- If you have to use e-mail, beware of making spontaneous statements that could erroneously imply legal violations or be embarrassing if it is produced or becomes public.
 - Appearance is sometimes as important as reality.
- Generally, e-mails should only contain language that you would feel comfortable putting in a formal memo to the General Counsel.

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Avoid Linkage

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- Avoid weird gifts
- It is becoming more important to have a policy on giving to charities and non-profits
 - Procedural approach
 - Substantive approach
- Industry-specific rules, e.g., MSRB G-17

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Vetting Consultants

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- Compensation should be commensurate with consultant's services and industry standards
 - Make sure contingent fees/commissions are permitted
- Make sure consultant agreement is detailed and has proper representations and warranties
 - Good idea to make consultant regularly certify that it is complying with reps and warranties
 - Beware of reimbursement of expenses – especially those related to gifts and entertainment of public officials and political contributions
- Consultant relationship should be disclosed to government agency
 - May be specifically required under lobbying laws and procurement rules
- Know who you are hiring (does consultant, or someone at consultant's firm, have a public or fiduciary position with government)

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Strict Liability Pay-to-Play Laws

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- Pay-to-play laws can prohibit a company from doing business or entering into a contract with a governmental entity if the company or its affiliates, and their PACs, owners, employees, directors, outside consultants, or family members make or solicit political contributions in that jurisdiction to officeholders, candidates, political parties, or other political committees (e.g., PACs)
- Nearly all the strict liability pay-to-play laws deal with political contributions where donor has state or local business. In certain limited jurisdictions, the restriction includes a gift or gratuity, not merely a political contribution.
- Does *McCutcheon* affect these laws?
 - Creates further doubt that these are constitutional
- Federal pay-to-play lawsuits
 - Georgia, Tennessee, and New York Republican Parties are challenging MSRB Rule G-37 as it applies to municipal advisors
 - Only challenging rule's application to federal contributions
 - Oral arguments before 6th Circuit on May 4, 2017

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Pay-To-Play Laws – Political Contributions

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- Pay-to-play laws in the following jurisdictions:
 - MSRB Rule G-37 (amended to cover municipal advisors), SEC Rule 206(4)-5, SEC Rule 15Fh-6, CFTC Sec. 23.451, FINRA Rule 2030
 - California, Connecticut, Florida, Hawaii, Illinois, Kentucky, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, and West Virginia
 - Albuquerque, Allentown (PA), Chicago, Chicago Ridge (IL), Cook County (IL), Dallas, Detroit, Houston, Jefferson Parish (Louisiana), Lehigh County (PA), Miami Beach, Miami Gardens, New Orleans, New York City, Orange County (FL), Orange County (NY), Philadelphia, Providence, Salt Lake City (UT), Salt Lake County (UT), San Antonio, Seattle
 - In California: All California Counties, Culver City, Los Angeles City, L.A. County MTA, Oakland, Pasadena, San Francisco, Santa Ana, and CalSTRS
 - In New Jersey: numerous localities
- We are aware of pay-to-play reporting-only requirements in Connecticut, Illinois, Maryland, Missouri, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, Denver, Detroit, DuPage County (IL), Kane County (IL), Los Angeles City, Nassau County (NY), Providence, San Antonio, and for CalPERS and CalSTRS

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State and Local Pay-To-Play Laws

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- Covered donors vary depending on the law
 - Some cover spouses and/or children (e.g., Connecticut, New Jersey, Denver, Illinois, Kentucky, Pennsylvania, and Philadelphia)
 - Some cover partners, officers, and/or directors (e.g., Connecticut, Illinois, New Jersey, and New Mexico)
 - Some cover employees who are dealing with the agency on a contract (e.g., Connecticut and California)
 - Some only cover corporate or PAC contributions (e.g., Hawaii, South Carolina, L.A. County, and Oakland)
 - Some cover all employees (e.g., L.A. MTA)
 - Some cover outside consultants who solicit state contracts (e.g., New Jersey pension fund rule)
 - Some cover affiliates, employees and directors of affiliates, and shareholders

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Pay-to-Play Laws – Gifts and Entertainment

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- Trend toward including gifts and entertainment in pay-to-play laws
 - New Jersey: debarment liability for violation of vendor ban EO
 - Philadelphia Executive Order gift ban contains a penalty of disqualification and/or debarment
 - Virginia: restriction on gifts during pendency of bid
 - CalSTRS adopted a policy that it may not do business with a company for two years if the company violates the \$470 per year gift limit
 - L.A. City limits gifts from an underwriting firm and its officers, public finance employees, and affiliates to \$49.99 combined during the year prior to and following selection for underwriting non-competitive bid revenue bonds
 - New Mexico has several gift provisions in its various pay-to-play laws
 - Pennsylvania has a gift restriction in its municipal pension system pay-to-play law
 - Pasadena prohibits gifts exceeding \$50 from the period beginning when the covered recipient approves the contract and (i) 1 year after covered recipient's term or departure from office; or (ii) 5 years after the approval, whichever is first

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Strategy for Pay-to-Play Compliance

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- Who do you pre-clear?
- What do you pre-clear?
- Importance of avoiding willful blindness
 - Use a negligence standard for due diligence
 - Appearance concerns and legal liability

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Candidate/Official Appearances

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- How to analyze such appearances:
 - Is the candidate appearing in his/her capacity as a candidate or a sitting official?
 - As an official, the campaign finance and pay-to-play laws do not apply
 - If as a candidate:
 - » Make sure there is no impermissible in-kind contribution under campaign finance laws
 - » Make sure it does not trigger a ban under pay-to-play law (can cover both in-kind contribution and solicitation of contributions)

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Gift Laws

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- Any time you pull out your credit card or spend money and a public official participates in the event or occasion, it is likely you are engaging in regulated activity.
- Providing anything of value to anyone (especially a public official or employee) triggers gift, and possibly lobby and pay-to-play, rules.
- In some jurisdictions, a cup of coffee may violate the law.
- In-kind gifts are also covered. Offering a ride in a car or use of equipment in a facility is something of value and is included in the definition of gift.
- You cannot avoid the restrictions by not putting in for the expense. Regardless of whether it is submitted for reimbursement, the expenditure is regulated.

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What is a Gift Law?

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- Prohibition, limit, or restriction on providing personal benefit to public officials.
- Covered gifts include anything of personal value, such as meals, entertainment, transportation, and lodging, including in-kind gifts; but not in-kind political contributions.
 - Factors to consider
 - » Timing
 - » Contacts with campaign staff or office staff?
 - » Content of presentation/meet and greets vs. campaign events
- Federal government, each state, and certain cities and counties have their own separate gift laws.
 - FCPA and jurisdiction-specific foreign gift issues

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Federal Congressional Gift Rules

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- **Lobbyist/Lobbying Firm/Lobbyist Employer Gift Ban** – the gift limit from lobbyists, lobbying firms, and lobbyist employers is \$0.
- **Non-Lobbyists/Non-Lobbying Firms/Non-Lobbyist Employers** – For those entities that are not lobbyists and do not employ a lobbyist, gifts are limited to \$49.99 per occasion and \$99.99 per year.

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Federal Congressional Gift Rules

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- However, many gift exemptions are available, even to lobbyists/lobbying firms/lobbyist employers, including, but not limited to:
 - Reception exemption
 - Nominal food in certain settings
 - Widely attended gathering
 - Outside activities
 - Friendship (cannot be expensed and subject to increased scrutiny)
 - Site visits: food and local travel outside D.C. (House rules vs. Senate rules)
 - Attendance at events sponsored by charity (House rules vs. Senate rules)
 - Home district products
 - Nominal items (baseball caps, t-shirts, and greeting cards)
 - Training
 - Informational materials
 - Items paid for at market value or promptly returned
 - Commemorative items (allows certain gifts during site visit)
 - Personal hospitality exemption is not permitted for lobbyists
 - Political contributions

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Site Visits: Senate – The 5/50 Rule

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- Non-political constituent visit where Senator or staff pays his or her own travel
 - Visit must take place at least 35 miles outside of D.C.
 - On-site meal may be served and corporation may provide local transportation
 - » A lobbyist may not participate in the meal
 - » The cost of the meal may not exceed \$50
 - » Five or more non-lobbyist constituents must participate

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Site Visits: House

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- Non-political visit where Member of Congress or staff pays his or her own travel
 - Visit must take place at least 35 miles outside of D.C.
 - Member may speak about issues of the day to all employees. No advocacy of any kind or fundraising.
 - On-site meal may be served and corporation may provide local transportation
 - » Lobbyist may participate in meal and accompany local transportation

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Federal Executive Branch Gift Rules

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- Gifts to executive branch officials and employees are generally limited to \$20 per occasion and \$50 per calendar year.
- Commonly used exceptions include:
 - There is no reception exception
 - Widely attended gathering (but requires pre-clearance from agency)
 - Meals and entertainment from non-prohibited source
 - Personal relationship (factors: personal payment and relationship history)
 - Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal
 - Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation
 - Gifts the receipt of which is specifically authorized by statute (e.g., Foreign Gifts and Decorations Act)
 - Gifts to the President and Vice President

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HLOGA Enforcement: Criminal and Civil

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- **Donor Liability** – HLOGA amends the Lobbying Disclosure Act ("LDA") to make lobbyists, lobbying firms, and lobbyist employers liable for providing gifts or travel not permitted by Senate or House rules.
- **Increased Penalties** – HLOGA amends the LDA to increase civil penalties for violations and add criminal penalties (up to 5 years in prison and/or fines under Title 18 of the U.S. Code). HLOGA sets a "knowingly and corruptly" standard for criminal penalties.
- There is still a 60-day cure provision for reporting violations, but not for violations of the gifts law, which are the basis of the LD-203 certification.

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Types of State and Local Gift Laws

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- Absolute ban regardless of value (e.g., Florida lobbyist law).
- Dollar limits – Some are per occasion (e.g., Florida non-lobbyist law – \$100 per occasion) and some are per period (e.g., California – \$470 per 12-month period).
- Prohibition on gifts that may reasonably tend to influence an official (Contrast: New Jersey and Nevada).

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State and Local Gift Law Exemptions

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- Meals are sometimes exempt (e.g., Michigan lobby gift law).
- Travel and entertainment are sometimes exempt – usually, they must be provided in connection with giving a speech or as part of official duties (e.g., New York).
- Single source issue – In states that have an aggregate gift limit, a company and its employees are considered part of a single source. Gifts made by those employees to a certain official are aggregated toward the same limit (e.g., Kentucky and Rhode Island). Subsidiaries are generally not included.

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Recent Enforcement

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- More and more RFPs ask for certification of gift law compliance
- Philadelphia fines person who offered Phillies baseball tickets to regulator
- Fine in connection with a California lobbyist paying for a public official's \$52 lunch
- Enforcement cases in Ohio and California in connection with prohibited and unreported sporting event tickets
- A regulated company's series of gifts to government officials of its New York regulator ranging in value from \$8 to \$72 resulted in fines nearing \$1.7 million
- Illinois officials were fined for accepting fair beer tickets that they distributed to others
- New York legislators were told they must return bobblehead dolls that were accompanied by a letter thanking them for passing legislation

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Practical Considerations

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- Valuation
 - Fair market value/face value vs. cost vs. value on secondary market
 - » Massachusetts State Ethics Commission found a violation when an interested baseball team owner sold World Series tickets to a city mayor for face value when such tickets were unavailable to the general public at face value and were offered for much more on craigslist
 - Actual consumption vs. pro rata share
- Tax and tip
- Buydowns
 - Permissible in California and Florida, impermissible in Illinois and Chicago
- Splitting
 - Permissible in Florida, impermissible for Louisiana's meal limit
- Bargained-for in an arms-length agreement (e.g., BPA, advisory board meetings)

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Practical Considerations

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- Gift to agency
 - Related to official duties
 - Caution on who accepts/agency protocols on accepting gifts
- Consultant gifts
 - Is client liable?
 - » Did client participate?
 - » Did client pay?
 - Negligence standard: reason to know
- Reps and warrants re: expense reimbursements
- Reputational risk

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How to Comply?

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- Types of preclearance strategy
 - Preclear everyone and everything
 - Preclearance thresholds
- Gift preclearance software

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Lobbying Laws

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- Three categories of activities may trigger lobby registration and reporting requirements at federal, state, and local levels.
 - Attempt to influence legislation.
 - Attempt to influence legislation or formal rulemaking by executive branch agency.
 - Attempt to influence legislation or any decision of executive branch agency, including financial arrangements and contracts (e.g., seeking business from agency).
- Thresholds: Even if activity is considered lobbying activity, must meet thresholds (e.g., \$3,000 compensation in Connecticut; 2 contacts for executive lobbying in Kentucky; and 25 hours or \$2,500 compensation in Massachusetts).
- Special issues when lobbying on behalf of an outside client
- Placement agent restrictions under public pension fund policies

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Federal Lobbying Law—Lobbying Disclosure Act of 1995 ("LDA") and Honest Leadership and Open Government Act of 2007 ("HLOGA"): LD-1 Report

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- Three requirements must be met to trigger LDA registration and reporting requirements:
 - A company must have at least one employee who spends 20% or more of his or her working time engaging in lobbying activity;
 - That same employee must have 2 or more lobbying contacts; and
 - The company must spend more than \$13,000 on such lobbying activity over a 3-month period.
 - » Lobbying firm threshold: lobbying income for a particular client must exceed \$3,000 over a 3-month period.
- Register only the entity that employs the lobbyists.
- *Foreign-owned entities* – Requirement to list all foreign entities that are 20% equitable owners of the registrant (including intermediate foreign entities), in major part supervise or control the registrant's activities, or are affiliated with the registrant and have a direct interest in the outcome of the lobbying activity.

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What is Lobbying Activity Under the LDA and HLOGA: LD-2 Report

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- Lobbying activity
 - Lobbying contacts; and
 - Research and preparation for such contacts (i.e., work done with the intent that the results will be used for lobbying contact).
 - » Includes strategizing, planning, possibly other background work
 - » Does time spent at PAC fundraisers count?
- Covered officials
 - Lobbying contact includes making the following communications in an attempt to influence legislation, federal contracts, or any other position of the federal government:
 - » Under Methods A and C, communications with Congressional members and staff; and
 - » Under Method A (LDA), communications with Covered Executive Branch Officials (i.e., White House Staff, Military Personnel at or over pay grade O-7, and Presidential and Schedule C Appointees but not career SES employees).
 - » Plum book:
<https://www.govinfo.gov/app/#contentDetails?packageId=GPO-PLUMBOOK-2016>

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LD-203 Reports – Semi-Annual

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- Reports are due 30 days after the end of a semi-annual period. Upcoming due dates:
 - July 31, 2017
 - January 30, 2018
- Semi-Annual Disclosure Report ("LD-203") – Lobbyists, lobbying firms, and lobbyist employers are required to file a semi-annual report detailing political contributions, charitable contributions, and other expenditures related to covered legislative and executive branch officials.
- Even if an employee had no activity or activity that fell below the threshold for becoming a lobbyist, if he or she was listed on an LD-2 report, that employee must file an LD-203 for that semi-annual period.

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Traditional Lobbying Laws

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- Category 1 lobbying (attempting to influence legislation)

Maine	North Dakota
Montana	Oregon
Nebraska	South Dakota
Nevada	Wyoming
- Category 2 lobbying (attempting to influence legislation or rulemakings)

Alaska	New Mexico
Colorado	South Carolina
District of Columbia	Utah
Hawaii	Vermont
Iowa	Washington
Minnesota	West Virginia
(as to state actions or decisions)	Wisconsin

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Trend Toward Category 3 Lobbying Laws

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- Beyond "traditional" lobbying, trend toward regulation of Category 3 lobbying (including financial arrangements and contracts)

Alabama	Illinois	New Hampshire
Arizona	Indiana	New Jersey
Arkansas	Kansas	New York
California (placement agents only)	Kentucky	North Carolina
Connecticut	Louisiana	Ohio
Delaware	Maryland	Oklahoma
Federal	Massachusetts	Pennsylvania
Florida	Michigan	Rhode Island
Georgia	Minnesota*	Tennessee
Idaho	Mississippi	Texas
	Missouri	Virginia
- Metropolitan governmental units only

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Grassroots Lobbying

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- Grassroots lobbying: Communicating with the public or segment of the public, including with vendors and employees, asking them to contact their government representatives regarding legislation.
- In 29 states, grassroots lobbying triggers registration.
- In 6 additional states plus D.C., grassroots lobbying does not trigger registration but if already registered, grassroots expenditures must be reported (Alaska, Florida, Kentucky, Maine, Texas, Wisconsin).

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Contingency Fee Bans

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- Contingent fee restrictions under the lobbying laws (e.g., restriction in California, Florida, Massachusetts, New York, and Connecticut).
- Types of compensation that may be permissible under a contingency fee ban:
 - Retainer or flat fee
 - Target-based compensation
 - » This approach has some risk
 - Discretionary bonus
 - » Has to be based on a number of factors
 - » Cannot be formula-based
 - » No dollar of compensation should be traceable to a particular contract

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Recent Developments

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- Rhode Island became Category 3 January 1, 2017.
- San Francisco lobbyist gift, contribution, and bundling bans effective January 1, 2018.
- In November 2016, Florida House passed a rule requiring electronic notice of appearance.
- Effective September 23, 2016, New York lobby law amended to:
 - Lower applicable thresholds to require a lobbyist client or entity that spends more than \$15,000 (previously \$50,000) to disclose the source of donations over \$2,500 (previously \$5,000), and
 - Exempt membership dues, fees, and assessments from the above disclosure requirement.
- New York also amended the definition of "lobbying" to exclude communications with professional journalists, effective August 24, 2016.
- On October 13, 2016, New York JCOPE released proposed regulations defining when social media activity constitutes direct or grassroots lobbying.
- New York's JCOPE issued an advisory opinion clarifying that "opening doors" constitutes lobbying and defining grassroots lobbying.

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Enforcement and Penalties

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- Civil fines to criminal penalties.
- Losing business in Category 3 states.
There are increased certification requirements.
Requirement that company certify in RFP that it is in compliance with lobbying laws.
- Mandatory under law in Kentucky and L.A. County.
- Matter of practice in Ohio, Florida, and Dade County.

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Compliance Strategy

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- Challenges:
 - Volume
 - Maintenance
- Strategies:
 - Preclearance
 - » Hub and spoke
 - » Blanket preapproval
 - » Prioritizing higher risk jurisdictions based on business
 - Educating business units

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